UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

RAYMOND J. CHALOULT, SR.,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 02-249-P-C***
	)	
INTERSTATE BRANDS	***)***	
CORPORATION,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTION TO STRIKE AND RECOMMENDED DECISION ON DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AND TO DISMISS

Defendant Interstate Brands Corporation ("IBC") seeks summary judgment as to both counts of plaintiff employee Raymond J. Chaloult, Sr.'s sexual-harassment complaint or dismissal of the complaint as a matter of law. *See* Motion for Summary Judgment and Motion To Dismiss, etc. ("S/J Motion") (Docket No. 13); Plaintiff's Complaint for Hostile Work Environment [and] Failure To Remedy Harassment ("Complaint"), attached to Notice of Removal (Docket No. 1). Ancillary thereto, IBC asks the court to strike certain portions of Chaloult's affidavit, statements of material facts and legal memorandum submitted in opposition to summary judgment. *See* Motion To Strike, etc. ("Motion To Strike") (Docket No. 28). For the reasons that follow, I grant in part and deny in part IBC's motion to strike and recommend that its motion for summary judgment be denied and its motion to dismiss be granted in part and denied in part.

I. Applicable Legal Standards

A. Summary Judgment

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

B. Motion To Dismiss

The motion to dismiss invokes Federal Rule of Civil Procedure 12(b)(6). *See* S/J Motion at 9. "In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The

defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F.Supp.2d 316, 318 (D. Me. 2003).

Ordinarily, in weighing a Rule 12(b)(6) motion, "a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." *Alternative Energy*, 267 F.3d at 33. "There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (citation and internal quotation marks omitted).

II. Factual Context

A. Motion To Strike

I address at the outset IBC's motion to strike, which partly defines the boundaries of facts cognizable on summary judgment, granting it in part and denying it in part as follows:

Point A(i). Affidavit of Raymond J. Chaloult, Sr. ("Chaloult Aff.") (Docket No. 24) ¶ 3; Plaintiff's Separate Statement of Material Facts Not [in] Dispute ("Plaintiff's Additional SMF") (Docket No. 23) ¶ 13: **Denied.** "Although it is true that a party opposing summary judgment cannot create a genuine issue of material fact by the simple expedient of filing an affidavit that contradicts clear answers to unambiguous questions in an earlier deposition," *Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 26 (1st Cir. 2002), Chaloult's statement in his affidavit that he "watched as Phouc Tran came up from Seth McCoy, a co-worker, and pinched him or grabbed him in the buttocks," whereupon "McCoy jumped and then yelled out," Chaloult Aff. ¶ 3, is essentially consistent with Chaloult's deposition testimony that he "observed Mr. Tran walking in back of Mr. McCoy and he

done something to Mr. McCoy because Mr. McCoy jumped. Like I don't know if he pinched him or what on his butt," Deposition of Raymond J. Chaloult, Sr. ("Chaloult Dep."), filed with S/J Motion, at 53.

Point A(ii). Chaloult Aff. ¶ 6; Plaintiff's Additional SMF ¶ 18; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 22) ¶ 36: **Denied.** Chaloult's statement in his affidavit that Tran "approached me from behind and grabbed me just above the hips and simulated a sexual act, pushing his groin into my buttocks, while he moaned," Chaloult Aff. ¶ 6, is not inconsistent with his deposition testimony answering "yes" to the question whether there was an incident "where Mr. Tran touched both sides of your body," Chaloult Dep. at 66.

Point A(ii), Footnote 1. Plaintiff's Additional SMF ¶¶ 18-19, 22; Plaintiff's Opposing SMF ¶ 92: **Denied.** Paragraphs 18, 19 and 22 of the Plaintiff's Additional SMF do not rely solely on allegations of Chaloult's complaint to buttress the facts in issue. Paragraph 92 of the Plaintiff's Opposing SMF does; however, it does so appropriately given that the subject matter is the nature of the allegations set forth in the complaint. IBC's further arguments notwithstanding, *see* Reply Memorandum ("Strike Reply") (Docket No. 38) at 5-6, the fact that language in an affidavit tracks, even verbatim, language of allegations in a complaint does not render the affidavit a "mere allegation[] or denial[] of the adverse party's pleading" for purposes of Federal Rule of Civil Procedure 56(e).[1]

Point A(iii). Chaloult Aff. ¶ 7; Plaintiff's Additional SMF ¶ 19: **Denied.** Chaloult states in his affidavit that "[t]he first act of harassment by Tran against me occurred in September of 2001. While I worked in the men's locker room opening the trash, Tran walked up behind me and rubbed himself

[1] Although "[e]ven in employment discrimination cases where elusive concepts such as motive or intent are at issue, summary judgment is appropriate if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation," *Benoit v. Technical Mfg. Corp.*, 331 F.3d 166, 173 (1st Cir. 2003) (citations and internal quotation marks omitted), Chaloult's (*continued on next page*)

against my buttocks. At first I thought it was a coincidence. But given the subsequent conduct, I knew it was intentional." Chaloult Aff. ¶ 7. This is not inconsistent with, or an improper embellishment of, Chaloult's admission on summary judgment that he thought this incident, in which "Tran came up from behind him and either rubbed up against him or touched Plaintiff with his finger as he passed by Plaintiff," was "an accident," *see* Defendant's Statement of Material Facts Not in Dispute ("Defendant's SMF") (Docket No. 14) ¶ 44; Plaintiff's Opposing SMF ¶ 44, or Chaloult's underlying deposition testimony that the incident involved Tran "rubb[ing] himself against me. I felt something. I don't know if it was a finger or what. . . . But I overlooked like, you know, it's an accident, you know. It's – that's why I never reported it. That was the first time," Chaloult Dep. at 73. *See Hinkley v. Baker*, 122 F. Supp.2d 57, 59 n.1 (D. Me. 2000) (acceptable for plaintiff on summary judgment to elaborate in affidavit on details of conduct alleged in her complaint); Complaint ¶ 14 (describing Tran as having "felt [Chaloult's] buttocks").

Point A(iv). Chaloult Aff. ¶¶ 6, 9; Plaintiff's Additional SMF ¶¶ 22, 27: **Denied.** Chaloult's negative answer to the deposition question, "Is there anything else about your claim that you feel is important that we haven't addressed today?," *see* Chaloult Dep. at 110, does not foreclose him from identifying additional incidents consistent with the allegations made in his complaint, *see Hinkley*, 122 F. Supp.2d at 59 n.1; *compare* Chaloult Aff. ¶¶ 6, 9 *with* Complaint ¶¶ 8, 16, 18.

Point A(v). Chaloult Aff. ¶ 10; Plaintiff's Additional SMF ¶ 29; Plaintiff's Opposing SMF ¶ 88: **Denied.** In the deposition passage on which IBC relies, Chaloult was not asked how IBC's alleged failure to provide him with a secure workplace had affected him; rather, he was asked: "How did it affect you – you personally?" Chaloult Dep. at 111.

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affidavit sets forth specific, concrete facts, *see generally* Chaloult Aff.

Point B(i).[2] Chaloult Aff. ¶ 4; Plaintiff's Additional SMF ¶ 14; Plaintiff's Opposing SMF ¶ 84: **Denied.** The statement in question (that McCoy told Chaloult Tran had said that an "S" on Tran's t-shirt stood for "sex with Seth") is offered not for the truth of the matter asserted, but for its relevance to Chaloult's state of mind and his perception of the alleged hostile environment. *See* Plaintiff's Opposition to Defendant's Motion To Strike ("Strike Opposition") (Docket No. 37) at 5; Fed. R. Evid. 801(c). IBC's rebuttal argument notwithstanding, *see* Strike Reply at 2-3, such evidence is relevant for the purposes for which Chaloult offers it, *see, e.g.*, *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 n.7 (8th Cir. 1999) ("Chrysler contends that Carter knew of the graffiti only through hearsay, but there is no dispute that she heard about its existence during the time in which she experienced harassment. It is thus relevant on whether a hostile environment existed and whether Carter reasonably perceived other conduct to be hostile or abusive.").

Point B(ii). Plaintiff's Additional SMF ¶ 24; Plaintiff's Opposing SMF ¶ 82: **Denied.** The statement in question is based on a combination of what Chaloult perceived (heard and saw) and what Aaron Williams told him immediately after the incident in question (in which Tran allegedly grabbed Williams' penis and buttocks). To the extent Chaloult perceived the incident, it is not hearsay; to the extent he relies on Williams' report, Williams' statements fall within exceptions to the hearsay rule pertaining to present-sense impressions and excited utterances. *See* Fed. R. Evid. 803(1) & (2).

Point B(iii). Plaintiff's Additional SMF ¶¶ 11, 25: **Granted in part, denied in part**. Granted as to paragraph 11, which is phrased as though offered for the truth of the matter asserted. Denied as to paragraph 25, which is phrased in a manner consistent with Chaloult's explanation that it is offered to illustrate his state of mind and his perception and knowledge of the hostile environment. *See* Strike Opposition at 5; *Carter*, 173 F.3d at 701 n.7.

[2] IBC titles this section of its brief section II; however, it is obvious from the overall context that it meant to label it subsection B. (*continued on next page*)

Point B(iv). Chaloult Aff. ¶ 11: **Granted**. Chaloult's argument notwithstanding, *see* Strike Opposition at 6, he fails to establish that the statement in question qualifies as an admission by a party-opponent or a statement against interest. *See* Fed. R. Evid. 801(d)(2) ("The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), [or] the agency or employment relationship and scope thereof under subdivision (D)[.]"); Fed. R. Evid. 804(b)(3) (rule regarding statements against interest applies when declarant is unavailable as a witness).

Point B(v). Plaintiff's Additional SMF ¶ 12: **Denied**. The statement in question is not offered for the truth of the matter asserted, but rather for Chaloult's state of mind and perception or knowledge of the alleged hostile environment. *See* Strike Opposition at 6; *Carter*, 173 F.3d at 701 n.7.

Point B(vi). Chaloult Aff. ¶¶ 12-14 & Exhs. 1-3 thereto; Plaintiff's Additional SMF ¶¶ 64-67; Plaintiff's Opposing SMF ¶ 95: **Denied**. IBC objects to these statements to the extent they rely on unauthenticated documents that Chaloult states he received from the Maine Human Rights Commission ("MHRC"), which IBC asserts are inadmissible pursuant to any exception to the hearsay rule. *See* Motion To Strike at 6-7; Chaloult Aff. ¶ 2. A document that is "a purported public record, report, statement, or data compilation, in any form," can be authenticated by evidence that the document is "from the public office where items of this nature are kept." Fed. R. Evid. 901(b)(7); *see also, e.g.*, 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 7112 at 126-28 (2000) ("[T]he key is showing that the item was in the custody of a public office, not that it was prepared by a public official"; such a showing does not require the testimony of the custodian of such records and may be established by circumstantial evidence). Chaloult avers in his affidavit that his statements are based on personal knowledge as well as documents he received from the MHRC. *See*

Compare Motion To Strike at 4 *with id. generally*.

Chaloult Aff. ¶¶ 2, 14 & Exh. 3 thereto. Moreover, an exception to the hearsay rule does obtain – namely, Federal Rule of Evidence 803(8), pursuant to which public records of an agency are admissible "unless the sources of information or other circumstances indicate lack of trustworthiness." No lack of trustworthiness is shown in this case.

Point C. Portions of Chaloult's opposition brief in which he relies upon unpublished opinions: **Denied.** First Circuit Local Rule 36.2, on which IBC relies for the proposition that, except in related cases, a party may not cite to this court a decision unpublished in a printed West reporter, *see* Motion To Strike at 7, has been superseded by First Circuit Local Rule 32.3, which makes clear that it pertains only to citation of unpublished opinions to the First Circuit and, in any event, permits citation of such opinions in a broader range of circumstances than formerly was the case. *See, e.g.*, 1st Cir. Loc. R. 32.3(a)(4) ("Almost all new opinions of this court are published in some form, whether in print or electronic medium. The phrase 'unpublished opinion of this court' as used in this subsection and Local Rule 36(c) refers to an opinion (in the case of older opinions) that has not been published in the West Federal Reporter series, e.g., F., F.2d, and F.3d, or (in the case of recent opinions) bears the legend 'not for publication' or some comparable phraseology indicating that citation is prohibited or limited."); *see also, e.g., Owens v. United States*, 236 F. Supp.2d 122, 130 n.3 (D. Mass. 2002) (noting change in First Circuit rule).

This court has no local rule prohibiting citation of unpublished opinions. In any event, all of the opinions in issue are published on Westlaw and none is prefaced by a "not for publication" type of legend. *See* S/J Opposition at 7-8, 12 & 16 (citing *Martin v. City of Biddeford*, No. 02-122-P-H, 2003 WL 1712510 (D. Me. Apr. 1, 2003) (rec. dec., *aff'd*, 261 F. Supp.2d 34 (D. Me. 2003)); *Shaw v. Maine Sch. Admin. Dist. #61*, No. 00-217-P-C, 2001 WL 55404 (D. Me. Jan. 22, 2001) (rec. dec.,

aff'd, Mar. 8, 2001); *Voisine v. Danzig*, No. 98-340-P-DMC, 1999 WL 331171187 (D. Me. Jul. 14, 1999)).

Point D. Plaintiff's Opposing SMF ¶ 93: **Granted**. While MHRC right-to-sue letters and the like typically are excluded at trial on the ground that their contents are more prejudicial than probative, *see, e.g.*, *Patten v. Wal-Mart Stores East, Inc*., 300 F.3d 21, 26-27 (1st Cir. 2002), Chaloult's objection to admission of the MHRC investigation report on the ground of relevancy, *see* Plaintiff's Opposing SMF ¶ 93; Strike Opposition at 7, is not well-taken in this context. The report is relevant to IBC's argument on summary judgment that Chaloult failed to exhaust his remedies at the MHRC level.

Point E. Plaintiff's Additional SMF ¶¶ 2, 5, 10, 12, 16, 29-33, 35, 40, 46, 49-55, 58, 65-66: **Granted in part and denied in part** for reasons set forth in the section of facts cognizable on summary judgment that follows.[3]

B. Facts Cognizable on Summary Judgment

With the foregoing peripheral issues resolved, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision:

IBC hired Chaloult on June 17, 1999 as a dough mixer in the pie department of its bakery in Biddeford, Maine. Defendant's SMF ¶ 1; Plaintiff's Opposing SMF ¶ 1. On December 2, 2000 he transferred to the company's sanitation department. *Id*. IBC still employs Chaloult among the more than four hundred production workers and more than seven hundred total associates employed at its bakery. *Id*.

[3] Chaloult protests, *inter alia*, that IBC "simply makes a boilerplate assertion the subject facts are incomplete or misleading." Strike Opposition at 7. I construe this section of the Motion To Strike as incorporating, by reference, objections of a similar nature (if any) set forth in relevant paragraphs of IBC's reply statement of material facts.

Phuoc Tran began work at IBC's bakery in May 2000 as an on-call employee. *Id*. ¶ 2. Tran, a Vietnamese immigrant, and Chaloult were co-workers in the sanitation department during 2000 and 2001. *Id*. ¶¶ 2-3. According to Chaloult, Tran's ability to understand English "seems to be okay." *Id.* ¶ 4.

Kenneth Shanholtz is an assistant sanitation supervisor for IBC. *Id*. ¶ 5. Linda Cannell is currently president of Chaloult's union, B.C.T.G.M. Local 334, and has also served as a union shop steward. *Id*. ¶ 6. Cannell has never been a member of IBC's management. *Id*.

At all times relevant to this lawsuit, Joe Cabral has been IBC's assistant human resources manager, Gary Bell has been a supervisor in IBC's sanitation department, and Robert Mayberry has been an employee in IBC's sanitation department. *Id*. ¶¶ 7-9. Aaron Williams also has been an employee in IBC's sanitation department. *Id*. ¶ 11. Chaloult started to see Greg Dumas, L.C.S.W., on or about November 6, 2001. *Id*. ¶ 10. Dumas provides counseling; Chaloult talks to him about things that are bothering him. *Id*.

When IBC hired Chaloult, it provided him with, and trained him with respect to, its sexual-harassment prevention policy. *Id*. ¶ 12. IBC stresses this policy "first thing." *Id*. Chaloult received this policy, and IBC reviewed it with him. *Id*. Chaloult read and understood the policy on preventing sexual harassment, including that part stating that employees are encouraged to report incidents of sexual harassment to their supervisors. *Id*. He also received annual reminders of IBC's harassment-prevention policy, which reinforced that he must promptly report to a supervisor any incident of sexual harassment involving, or witnessed by, him. *Id*. He understood this as well. *Id*.

IBC also provides yearly sexual-harassment training to its supervisors, including generalized training about processing and investigating a claim of sexual harassment. *Id*. ¶ 14. This training lasts a full day and includes provision of written materials. *Id*.

Chaloult also received IBC's equal-opportunity policy, which states that prohibited harassment includes conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. *Id*. ¶ 15. He understood that IBC strictly prohibited this type of behavior. *Id*. He also read and understood the section of the policy stating that there would be no unlawful retaliation by IBC against any employee or applicant for reporting unlawful discrimination or harassment. *Id*. He also read and understood the section of the policy governing the procedure for reporting to IBC by any person who believed that he or she had been subjected to a violation of the anti-harassment policy or who knew of a violation of that policy. *Id*.

IBC's sexual-harassment policy states that supervisors must be sensitive to the problem of sexual harassment. Plaintiff's Additional SMF ¶ 56; Defendant's Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 27) ¶ 56. If a supervisor becomes aware of any violation or possible violation of the EEOC guidelines, he or she should report the incident immediately to the human resources manager or the plant general manager. *Id*. Supervisors have an affirmative duty to keep their work areas free from sexual harassment and are to take appropriate steps to prevent and eliminate it. *Id*.

Since joining IBC, Cabral has both received and provided training with regard to harassment prevention (including sexual harassment). Defendant's SMF ¶ 17; Plaintiff's Opposing SMF ¶ 17. He also was involved in creating IBC's training manual on sexual harassment for the plant at which Chaloult works. *Id*. Cabral prepared the sexual-harassment training to be provided to IBC's employees. Plaintiff's Additional ¶ 57; Defendant's Reply SMF ¶ 57. He set forth ten steps to prevent sexual harassment charges, including a requirement to "investigate all complaints – no matter how trivial or unjustified they appear to you." *Id*. The steps also include the admonishment: "Take

action. If the complaint is justified, correct the situation. Depending on the case, this may include requiring the harasser to apologize, ordering a cessation of the facts that led to the complaint, adjusting the salary, promoting or changing the working conditions of the persons who have suffered, or, in flagrant or repeated offenses, firing the harasser." *Id*.

Per IBC's current complaint procedure, an employee who believes he or she is being harassed is to report that harassment to Richard Morgano, head of IBC's human resources department, or Rhonda Tracy, its benefits coordinator. Defendant's SMF ¶ 16; Plaintiff's Opposing SMF ¶ 16. Alternatively, the employee can report the alleged harassment to his or her supervisor. *Id*. If harassment is reported to a supervisor, that supervisor is obligated to report it to Morgano (or the human resources department) if the employee allegedly being harassed is known or identified. *Id*. Once a complaint is lodged, either Morgano, Tracy or Cabral will investigate it. *Id*.

Aaron Williams began work for IBC on February 18, 2000. Plaintiff's Additional SMF ¶ 1; Defendant's Reply SMF ¶ 1.[4] In the early summer of 2001, Tran sexually harassed Williams for the first time. Plaintiff's Additional SMF ¶ 30; Deposition of Aaron J. Williams ("A. Williams Dep."), filed with S/J Motion, at 7.[5] Williams complained to his supervisor, Shanholtz. Plaintiff's Additional SMF ¶ 30; A. Williams Dep. at 11. Williams told Shanholtz that there had been some grabbing and that Tran had touched his groin and buttocks. Plaintiff's Additional SMF ¶ 30; A. Williams Dep. at 12, 25-26. Williams also told Shanholtz that Tran would make obscene gestures such as putting cream on his work gloves and acting like he was masturbating. Plaintiff's Additional SMF ¶ 30; A. Williams Dep. at 26.

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[4] Inasmuch as several individuals mentioned by the parties are surnamed Williams, I have used full names when necessary to avoid confusion.

[5] IBC's motion to strike paragraph 30 of the Plaintiff's Additional SMF on the ground that it is not supported by the citations given, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 30, is granted as to the phrase, "when he grabbed him in the crotch," and otherwise denied. IBC alternatively denies that Aaron Williams reported any harassment by Tran, *see* Defendant's Reply SMF ¶ 30; however, I (*continued on next page*)

Williams also reported the alleged harassment to his shop steward, Cannell. Defendant's SMF ¶ 57; A. Williams Dep. at 7-8. Cannell asked him to put his complaint in writing and submit it to IBC, but he declined to do so. Defendant's SMF ¶ 57; Deposition of Linda L. Cannell ("Cannell Dep."), filed with S/J Motion, at 29, 59. Cannell then contacted Shanholtz but refused, despite being asked, to tell him who had complained about Tran. Defendant's SMF ¶ 58; Deposition of Kenneth Shanholtz ("Shanholtz Dep."), filed with S/J Motion, at 22-23.[6] Cannell told Shanholtz only that the unidentified person was accusing Tran of inappropriate touching. Defendant's SMF ¶ 58; Shanholtz Dep. at 23-24.

Cannell indicated to Shanholtz that she simply wanted to meet with Tran and felt sure that this would resolve the matter. Defendant's SMF ¶ 60; Plaintiff's Opposing SMF ¶ 60. A meeting was set up involving Shanholtz, Cannell and Tran. *Id*. Company supervisor Chan Bui was also present to serve as an interpreter for Tran. *Id*. This meeting might have been on the same shift during which Williams spoke with Cannell, or it could have been a day or two later. *Id*. ¶ 61.

At no time during this meeting were any specific allegations mentioned, much less any reference made to Aaron Williams as the complainant. *Id*. ¶ 62. Bui was unaware that Tran had been accused of sexually harassing another employee. *Id*. Neither Shanholtz nor Cannell had Bui tell Tran that another employee said that he inappropriately touched him or that this employee was Aaron Williams. *Id*.

Through Bui, Shanholtz and Cannell told Tran that it was inappropriate to touch anyone – male or female. *Id*. ¶ 63. This was all that Shanholtz and Cannell had Bui tell Tran. *Id*. Tran indicated to Bui that he understood that he should not touch people or make fun of them. Defendant's SMF ¶ 64;

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view the cognizable evidence in the light most favorable to Chaloult.

[6] Chaloult attempts to deny this, asserting that Shanholtz knew the unidentified person was Tran, *see* Plaintiff's Opposing SMF ¶ 58; however, this does not effectively controvert IBC's assertion that Cannell did not inform Shanholtz of the identity of the accuser, Aaron (*continued on next page*)

Deposition of Chan Van Bui, filed with S/J Motion, at 16. Cannell's impression of the meeting was that Tran understood that it was inappropriate for him to touch anyone. Defendant's SMF ¶ 64; Cannell Dep. at 25. Tran also indicated that he had not touched anyone inappropriately. Defendant's SMF ¶ 64; Cannell Dep. at 34. However, at his deposition, Tran testified that he did not even know Shanholtz and denied ever meeting with Cannell to discuss the allegations against him. Plaintiff's Additional SMF ¶ 59; Defendant's Reply SMF ¶ 59.[7]

Shanholtz asked around if anyone had heard what Tran had done. Plaintiff's Additional SMF ¶ 31; Shanholtz Dep. at 24.[8] Shanholtz admits that he did not advise the human resources department of the situation. Plaintiff's Additional SMF ¶ 31; Shanholtz Dep. at 25, 27.[9]

After the meeting that Shanholtz had with Cannell, Bui and Tran, Shanholtz told Williams that he would no longer have to work with Tran. Plaintiff's Additional SMF ¶ 32; A. Williams Dep. at 26.[10] The arrangement lasted for only a week. Plaintiff's Additional SMF ¶ 32; A. Williams Dep. at 26-27. Within a week, Williams was again assigned to work with Tran. Plaintiff's Additional SMF ¶ 32; A. Williams Dep. at 27. Williams spoke to Shanholtz about the assignment, and Shanholtz simply said that was the way it was going to be. *Id*. Within a week or so of Williams' conversation with Shanholtz, he again complained to Shanholtz about Tran touching him or making sexual gestures.

Williams.

[7] IBC in effect qualifies this statement, noting that later in Tran's deposition he referred to a meeting involving an interpreter that IBC required him to attend, with respect to which he stated he was unable to recall the names of those involved. *See* Defendant's Reply SMF ¶ 59; Deposition of Phouc Tran ("Tran Dep."), filed with S/J Motion, at 21.

[8] Chaloult's further assertions that (i) Shanholtz admitted that his only response to Williams' complaint was to have the meeting with Tran and then ask around if anyone had heard what Tran had done, and (ii) Shanholtz admits he did not do anything further to investigate the allegations, *see* Plaintiff's Additional SMF ¶ 31, are disregarded inasmuch as they are neither admitted nor supported by the citations given.

[9] IBC tells a different story with respect to Williams' allegations, asserting that Williams reported the alleged harassment solely to shop steward Cannell and not to Shanholtz, and that prior to Cannell's report Shanholtz was unaware of any allegations that Tran had inappropriately touched anyone. *See* Defendant's Reply SMF ¶ 31; *see also* Defendant's SMF ¶ 59. However, I view the cognizable evidence in the light most favorable to Chaloult.

[10] IBC denies paragraph 32 of the Plaintiff's Additional SMF, *see* Defendant's Reply SMF ¶ 32; however, I view the cognizable evidence in the light most favorable to Chaloult.

Plaintiff's Additional SMF ¶ 33; A. Williams Dep. at 27.[11] He informed Shanholtz that Tran was continuing to do the same things he had been doing. *Id*.

In September 2001, Williams complained to two of his other supervisors, Bell and Dave Daly. Plaintiff's Additional SMF ¶ 34; A. Williams Dep. at 28-29.[12] The two supervisors told him to take his complaints back to Shanholtz. *Id*. IBC denies receiving the notice. Plaintiff's Additional SMF ¶ 34; Defendant's Reply SMF ¶ 34. There is no evidence that IBC ever took any action in response to Williams' complaint. Plaintiff's Additional SMF ¶ 34; Defendant Interstate Brands Corporation's Answers to Plaintiff's Interrogatories ("Defendant's Interrog. Answers"), filed July 15, 2003 by Chaloult, ¶ 24.

On at least two subsequent occasions Williams complained again to Shanholtz about Tran touching him or making sexual gestures. Plaintiff's Additional SMF ¶ 35; A. Williams Dep. at 29.[13] IBC denies receiving the notice. Plaintiff's Additional SMF ¶ 35; Defendant's Reply SMF ¶ 35. There is no evidence that IBC ever took any action in response to these complaints. Plaintiff's Additional SMF ¶ 35; Defendant's Interrog. Answers ¶ 24.

Until February 2002, when Williams went out on leave, Tran on numerous occasions grabbed Williams' buttocks or groin or tried to rub his groin into Williams' buttocks. Plaintiff's Additional SMF ¶ 4; A. Williams Dep. Exh. 1.[14] He also flashed Williams. *Id*. On one occasion, while Williams changed out of his work uniform, Tran came around the corner and shoved his hands into

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[11] IBC denies paragraph 33 of the Plaintiff's Additional SMF, *see* Defendant's Reply SMF ¶ 33; however, I view the cognizable evidence in the light most favorable to Chaloult.

[12] IBC partly denies paragraph 34 of the Plaintiff's Additional SMF, asserting that Bell (i) had no notice that Aaron Williams or any other employee had complained about Tran until Chaloult complained on or about September 21, 2001 and (ii) was unaware that Aaron Williams ever had complained about Tran touching him inappropriately, *see* Defendant's Reply SMF ¶ 34; however, I view the cognizable evidence in the light most favorable to Chaloult.

[13] IBC denies that Williams reported to Shanholtz that Tran was sexually harassing him, *see* Defendant's Reply SMF ¶ 35; however, I view the cognizable evidence in the light most favorable to Chaloult.

[14] IBC denies paragraph 4 of the Plaintiff's Additional SMF in part on the basis that Chaloult's reference to paragraph 57 of the Defendant's SMF does not support his statement as Local Rules 56(c) and (e) require, *see* Defendant's Reply SMF ¶ 4; however, (*continued on next page*)

Williams' underwear and grabbed his buttocks and penis. Plaintiff's Additional SMF ¶ 3; A. Williams Dep. at 30; A. Williams Dep. Exh. 1. Williams hollered and shoved Tran away. *Id*.

In mid-August 2001, while Mayberry ate his lunch in the break room, Tran came over to the table and sat beside him. Plaintiff's Additional SMF ¶¶ 5-6; Defendant's Reply SMF ¶¶ 5-6.[15] Tran picked up some mustard packets and squirted them onto his own leg. *Id*. ¶ 6. He then took his finger, dabbed it into the mustard and rubbed it on his groin area. *Id*. He was happy as a lark while doing so, smiling and saying something. *Id*. A couple of weeks later, as Mayberry went by the pie area where Tran worked, Tran hollered to him and then grabbed his shirt, lifted it open, pointed to his chest and started hollering something in Vietnamese with a grin on his face. *Id*. ¶ 7. Mayberry testified that Tran was kind of a nut. *Id*. ¶ 8. He did strange things. *Id*. When he was working and got upset, he started throwing things and hollering at people, giving them the finger. *Id*.

Seth McCoy, an employee and co-worker of Tran's, gave IBC a statement dated September 24, 2001 in which he said that he had multiple "run-ins" with Tran. *Id*. ¶ 9. On one occasion, in the presence of McCoy and a co-worker, Michael McPherson, Tran rubbed his buttocks and pounded one hand against the palm of the other hand. *Id.* Tran also wore a t-shirt that had a drawing of two hearts with a "P" in one of the hearts and an "S" in the other. *Id*. Tran told McPherson that the "S" meant "Seth sex." *Id*.[16]

On one occasion, while Chaloult waited outside the office of his supervisor, Shanholtz, to receive his daily orders, Chaloult heard Shanholtz yelling at Tran not to do it, to stop doing that and

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Chaloult's citation also refers to the underlying deposition exhibit, which does support it.

[15] Chaloult further alleges that in mid-August 2001, while Mayberry used a urinal, Tran approached him and grabbed his buttocks, *see* Plaintiff's Additional SMF ¶ 5; however, I grant IBC's motion to strike this statement on the ground that it is not supported by the citation given, which indicates that Tran patted, rather than grabbed, Mayberry's buttocks, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 5; Deposition of Robert G. Mayberry ("Mayberry Dep."), filed with S/J Motion, at 11.

[16] Chaloult's further assertion that "McCoy stated that Tran had grabbed his buttocks a couple of times," see Plaintiff's Additional SMF ¶ 9, is disregarded inasmuch as it is neither admitted nor supported by the citations given, which indicate that McCoy stated Tran had "brushed his hand" against McCoy's buttocks a couple of times, *see* handwritten statement of Seth A. McCoy dated Sept. 24, (*continued on next page*)

that he was sick. *Id*. ¶ 10.[17] The door was wide open. *Id*. Chaloult went into the office and saw Tran standing next to Shanholtz with two other supervisors present, Bell and Daly. Plaintiff's Additional SMF ¶ 10; Chaloult Dep. at 55-56. Shanholtz told Scott Jordan, among others, that Tran had rubbed his crotch up against him and that Shanholtz had to tell him to back off. Plaintiff's Additional SMF ¶ 10; Deposition of Scott D. Jordan ("Jordan Dep."), filed with S/J Motion, at 24.[18]

On another occasion Ernie Levesque, a co-worker, told Chaloult that while he was using the restroom Tran walked by and kicked the door open. Plaintiff's Additional SMF ¶ 12; Chaloult Dep. at 102-03. Levesque told Chaloult he would report the incident to the first supervisor he saw. *Id*.[19] Chaloult testified that on at least one occasion he saw Tran pinch McCoy on his buttocks. Plaintiff's Additional SMF ¶ 13; Chaloult Aff. ¶ 3.[20] Chaloult saw Tran wearing the t-shirt with the "S" and "P" on it. Plaintiff's Additional SMF ¶ 14; Chaloult Aff. ¶ 4. McCoy told Chaloult that Tran had said the "S" stood for "sex with Seth." *Id*. Chaloult also witnessed the mustard incident involving Mayberry and Tran. Plaintiff's Additional SMF ¶ 15; Chaloult Aff. ¶ 5.[21]

On one occasion, while Chaloult changed in the men's locker room, he heard a commotion as though someone were banging against the locker. Plaintiff's Additional SMF ¶ 24; Defendant's Reply SMF ¶ 24. He went over and saw Tran coming out and Aaron Williams pulling up his shorts. *Id*.

2001, filed July 15, 2003 by Chaloult, at Bates No. IBC 0262.

[17] IBC's motion to strike portions of paragraph 10 of the Plaintiff's Additional SMF as unsupported by the citations given, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 10, is granted as to the fourth sentence and the beginning of the fifth ("Shanholtz told most of the Sanitation Department about the incident. He told everyone . . . "), and otherwise denied. IBC also denies that Tran touched Shanholtz inappropriately or that Shanholtz called Tran "sick," *see* Defendant's Reply SMF ¶ 10; however, I view the cognizable evidence in the light most favorable to Chaloult.

[18] IBC qualifies this statement, asserting that Jordan indicated he did not know if Shanholtz was joking when he later discussed this incident. *See* Defendant's Reply SMF ¶ 10; Jordan Dep. at 24.

[19] IBC's motion to strike the first sentence of paragraph 12 of the Plaintiff's Additional SMF on the ground that it is unsupported by the citation given, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 12, is granted.

[20] In addition to moving to strike this statement on the basis that it contradicts Chaloult's earlier deposition testimony (addressed above and denied), IBC also denies it on the basis that it is unsupported by the citation given. I disagree.

[21] IBC moves to strike paragraph 16 of the Plaintiff's Additional SMF ("In addition to what Plaintiff saw and heard as described in Fact 10, Shanholtz told Chaloult that Tran had rubbed his groin area into Shanholtz.") on the ground that it is unsupported by the citation given. *See* Motion To Strike at 9; Defendant's Reply SMF ¶ 16. The motion is granted, and the statement is disregarded on

(*continued on next page*)

Williams told Chaloult that he had taken off his shirt and work pants and was in his underwear when Tran ran up to him, shoved his hands into Williams' underpants and grabbed him by the penis and buttocks. *Id*. Williams told Chaloult that was not the first time Tran had done that and that he had been doing it for some time. *Id*.[22]

On another occasion, Chaloult watched as Williams and Tran worked together in the cake room. Plaintiff's Additional SMF ¶ 26; Chaloult Dep. at 121-22. Tran, who was wearing rubber gloves, went over and grabbed Williams' buttocks. *Id*.[23] On at least a couple of occasions, Chaloult watched as Tran used plastic gloves to simulate masturbation. Plaintiff's Additional SMF ¶ 27; Chaloult Aff. ¶ 9. On one occasion, Mayberry told Chaloult that while he used a urinal, Tran went up behind him and grabbed him from the buttocks. Plaintiff's Additional SMF ¶ 28; Defendant's Reply SMF ¶ 28. Chaloult admits that he did not personally see Tran fondle Mayberry's buttocks. Defendant's SMF ¶ 84; Plaintiff's Opposing SMF ¶ 84.

On or about September 21, 2001 an incident occurred in which Tran allegedly touched Chaloult's buttocks in an inappropriate manner. Defendant's SMF ¶ 18; Plaintiff's Opposing SMF ¶ 18. On or about the same day Chaloult, accompanied by his union shop steward, Scott Jordan, went to company supervisor Bell. *Id*. ¶ 19. Bell believed he had to report the allegation and did so to his superior, Dave Williams. *Id*.[24] Bell indicated to Chaloult that he would bring in Tran, investigate and address the situation. *Id*.[25]

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that basis.

[22] Chaloult's further assertion that Rick Gallant, one of his co-workers, told him that Tran had grabbed him in his crotch area, *see* Plaintiff's Additional SMF ¶ 25, is disregarded inasmuch as it is neither admitted nor supported by the citation given.

[23] IBC qualifies this statement, noting that Chaloult testified that Tran grabbed Williams in the lower back or buttocks area. *See* Defendant's Reply SMF ¶ 26; Chaloult Dep. at 122.

[24] IBC contends that Chaloult told Bell not to do anything about the allegation, *see D*efendant's SMF ¶ 19; however, Chaloult disputes this, *see* Plaintiff's Opposing SMF ¶ 19; Chaloult Dep. at 33, 39, and I view the cognizable evidence in the light most favorable to him.

[25] IBC also states that prior to Chaloult's September 21 report Bell was not aware that any employee, including Chaloult, had complained about Tran, *see* Defendant's SMF ¶ 20; however, Chaloult disputes this, *see* Plaintiff's Opposing SMF ¶ 20; Jordan Dep. at 25-26, and I view the cognizable evidence in the light most favorable to him.

Chaloult also alleges that approximately three days prior to the September 21 incident involving Tran, while Chaloult was working in tight quarters Tran came up from behind him and either rubbed up against him or touched Chaloult with his finger as he passed by Chaloult. *Id*. ¶ 44. Chaloult thought this was "an accident." *Id*. Chaloult never reported this incident to IBC. Defendant's SMF ¶ 45; Chaloult Dep. at 72-73.[26]

On September 23 or 24, at approximately 3:30 p.m., while he was *en route* to a meeting, Cabral encountered Chaloult, Jordan and Mayberry in a stairwell. Defendant's SMF ¶ 21; Deposition of Joseph Cabral ("Cabral Dep."), filed with S/J Motion, at 51, 53. Mayberry had come at Jordan's urging; he had not intended to report anything to Cabral. Defendant's SMF ¶ 21; Mayberry Dep. at 26, 37-38. Jordan told Cabral that Chaloult and Mayberry wanted to make a complaint of sexual harassment against a fellow employee whose name Jordan would not provide. Defendant's SMF ¶ 21; Cabral Dep. at 51-52.[27]

Cabral told Jordan that he needed to speak with Chaloult, Mayberry and Jordan as soon as possible. Defendant's SMF ¶ 22; Plaintiff's Opposing SMF ¶ 22. Jordan indicated that he needed to call the union first and would get back to Cabral. *Id*. Cabral took the matter seriously. *Id*. Later that same day, he called David Williams, IBC's sanitation manager, and told him that he wanted to set up meetings with Chaloult and Mayberry. *Id*.

Later that day Cabral received a phone call from either Oscar Hodgkins, the union's former business agent, or from John Jordan, its current business agent, identifying Tran as the alleged harasser. *Id*. ¶ 23. Cabral then met with Paul Williams, who at the time was president of the local

[26] In a purported denial that is more in the nature of a qualification, and hence is treated as such, Chaloult points out that he asserted in his MHRC charge that Tran had consistently touched him on the buttocks. See Plaintiff's Opposing SMF ¶ 45; Charge of Discrimination ("MHRC Charge"), attached as Exh. 2 to Affidavit of Robert W. Kline ("Kline Aff.") (Docket No. 16).

[27] Chaloult attempts to deny that Jordan refused to name Tran as the harasser, *see* Plaintiff's Opposing SMF ¶ 21; however, the denial is disregarded inasmuch as it is not supported by the citations given.

union. *Id*. Paul Williams told Cabral that he was aware of the allegations, that a third employee was alleging harassment and that he had some statements, which he provided to Cabral. *Id*. Cabral arranged meetings with the complaining employees and Tran for September 28, 2001. *Id*. ¶ 24. Paul Williams asked if he could be present at all of the meetings, a request with which Cabral complied. *Id*.

On September 28, Cabral and Paul Williams had separate meetings with Tran, Chaloult, Mayberry and McCoy, the other employee who alleged Tran had harassed him. *Id*. ¶ 25. Prior to meeting with Chaloult, Mayberry and McCoy, Cabral read their statements and prepared questions for each. Plaintiff's Additional SMF ¶ 39; Cabral Dep. at 61.[28] The meeting involving Chaloult lasted between thirty and thirty-five minutes. Defendant's SMF ¶ 26; Plaintiff's Opposing SMF ¶ 26. Cabral asked Chaloult what happened, and Chaloult referred to his written statement. *Id*. Cabral said that IBC would be addressing the matter, investigating it and taking care of it. *Id*. ¶ 27. He also told Chaloult that he would be meeting with Tran, and that IBC would take the steps necessary to alleviate and correct the situation. *Id*. Cabral thanked Chaloult for coming forward, as reinforcement for him to continue to come forward if there were further issues. *Id*.[29] He also explained to Chaloult that if anyone attempted to retaliate against him for having reported the harassment, he needed to report such an attempt immediately. *Id*. Cabral took notes but destroyed them. Plaintiff's Additional SMF ¶ 41; Defendant's Reply SMF ¶ 41.[30] He did not ask Chaloult if he knew whether Tran had done anything beyond what was in Chaloult's statement. *Id*.

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[28] IBC moves to strike the majority of paragraph 39 of the Plaintiff's Additional SMF on the ground that it is unsupported by the citations given. *See* Motion To Strike at 9; Defendant's Reply SMF ¶ 39. That request is granted as to all sentences except for (i) that portion of the first sentence set forth above, (ii) the fifth sentence, which IBC admits, and (iii) the sixth sentence.

[29] IBC further alleges that Cabral asked Chaloult if anything else needed to be reported, *see* Defendant's SMF ¶ 27; however, Chaloult denies this, *see* Plaintiff's Opposing SMF ¶ 27; Cabral Dep. at 65, and I view the cognizable record in the light most favorable to him.

[30] IBC qualifies this statement, noting that Cabral testified that he believed he only destroyed his notes after making IBC's submission to the MHRC. *See* Defendant's Reply SMF ¶ 41; Cabral Dep. at 62-63.

At his meeting with Cabral and Paul Williams, Mayberry recounted separate incidents in mid-August 2001 in which Tran had touched Mayberry's buttocks in the bathroom and had spread mustard on his pants in the groin area while in IBC's cafeteria. *Id*. ¶ 28. There was no joking about these incidents during the meeting, and Cabral took the matter seriously. *Id*. At the meeting's conclusion, Cabral thanked Mayberry for coming in and told Mayberry to see him if any incidents occurred in the future or any retaliation issues developed. *Id*. ¶ 29.[31] Cabral also told Mayberry that he would be meeting with Tran and that IBC would take the necessary steps to alleviate and correct the situation. *Id*.

Cabral did not ask Mayberry if he knew if Tran had done this to anyone else. Plaintiff's Additional SMF ¶ 38; Mayberry Dep. at 29. Nor did he ask Mayberry who was present in the cafeteria during the mustard incident. Plaintiff's Additional SMF ¶ 39; Cabral Dep. at 69. Cabral did not ask anything about Chaloult's or McCoy's allegations. Plaintiff's Additional SMF ¶ 38; Defendant's Reply SMF ¶ 38. Mayberry does not know if the company brought in Tran to interview him, and the company never got back to him to inform him how the complaint had been concluded or resolved. *Id*. Mayberry had no further problems with Tran following the incidents described in the meeting. Defendant's SMF ¶ 30; Plaintiff's Opposing SMF ¶ 30.

At his meeting with Cabral and Paul Williams, McCoy also claimed that Tran had harassed him. *Id*. ¶ 31. Cabral told McCoy that he would be meeting with Tran and that IBC would take the steps necessary to alleviate and correct the situation. *Id*. Cabral did not ask any questions to find out from McCoy whether he was aware of Tran harassing anyone else. Plaintiff's Additional SMF ¶ 40;

[31] IBC further asserts that Cabral provided Mayberry the opportunity to let IBC know about other incidents that had occurred, *see* Defendant's SMF ¶ 29; however, Chaloult denies this, *see* Plaintiff's Opposing SMF ¶ 29; Cabral Dep. at 69, and I view the cognizable record in the light most favorable to him.

Defendant's Reply SMF ¶ 40.[32] McCoy had no further problems with Tran following the incidents described in the meeting. Defendant's SMF ¶ 32; Plaintiff's Opposing SMF ¶ 32.

After meeting with the three complainants, Cabral and Paul Williams met with Tran and informed him of the accusations against him. *Id*. ¶ 33. The meeting lasted thirty minutes. Plaintiff's Additional SMF ¶ 42; Defendant's Reply SMF ¶ 42. Cabral did not obtain a translator. *Id*. Cabral claims that they were able to communicate through brief words and actually showing and identifying to Tran the subject matter of the accusations. *Id*. Cabral told Tran that he was being blamed for touching. *Id*. Tran denied any inappropriate touching. Defendant's SMF ¶ 33; Plaintiff's Opposing SMF ¶ 33. Cabral told Tran more than once that he could not touch anyone at work. *Id*. Cabral also asked Tran to stay away from Chaloult, Mayberry and McCoy. *Id*.[33] Tran admitted that when Cabral spoke to him he understood, "but not all, just a little bit." Plaintiff's Additional SMF ¶ 60; Defendant's Reply SMF ¶ 60.[34] Tran testified that he received sexual harassment training but does not know what it is. *Id*. ¶ 61.[35]

Cabral assumed that all parties, including Tran, had told the truth. Plaintiff's Additional SMF ¶ 43; Cabral Dep. at 77.[36] Cabral admits that he did not ask Tran about the mustard incident or address any issue of Tran touching himself. Plaintiff's Additional SMF ¶ 44; Defendant's Reply SMF ¶ 44.[37] Cabral admits that he never contacted Shanholtz, any of Chaloult's supervisors or any

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[32] I grant IBC's motion to strike certain other portions of paragraph 40 of the Plaintiff's Additional SMF (the third through sixth sentences) on the ground that they are not supported by the citations given. *See* Motion To Strike at 9; Defendant's Reply SMF ¶ 40.
[33] IBC further states that Cabral and Paul Williams believed that Tran understood their message that he should not touch anyone at work, and Tran actually did comprehend it, *see* Defendant's SMF ¶ 34; however, Chaloult denies that Tran understood it, *see* Plaintiff's Opposing SMF ¶ 34; Tran Dep. at 13-14, 18, and I view the cognizable evidence in the light most favorable to Chaloult.
[34] IBC admits that this was Tran's testimony but denies the substance of the statement. *See* Defendant's Reply SMF ¶ 60. However, I view the cognizable evidence in the light most favorable to Chaloult.
[35] IBC admits that this was Tran's testimony but denies that he in fact lacked such an understanding. *See* Defendant's Reply SMF ¶ 61. However, I view the cognizable evidence in the light most favorable to Chaloult.
[36] IBC denies this, *see* Defendant's Reply SMF ¶ 43; however, I view the cognizable evidence in the light most favorable to Chaloult.
[37] IBC qualifies this statement, asserting that there is no evidence it had any knowledge, apart from the mustard incident, that Tran touched himself. *See* Defendant's Reply SMF ¶ 44.

supervisor in the sanitation department to find out if anyone was aware of problems with Tran, and it never occurred to him that Shanholtz, as Chaloult's supervisor, might have had knowledge of Tran harassing Chaloult or other employees. *Id*. ¶ 45.[38]

Following his meetings with Chaloult, Mayberry, McCoy and Tran, Cabral met briefly with Paul Williams. Defendant's SMF ¶ 51; Plaintiff's Opposing SMF ¶ 51. Paul Williams thanked Cabral for his efforts in the investigation, and Cabral asked him if he knew anything else about the issue. *Id*. Paul Williams then named Aaron Williams as a possible witness to harassment. Defendant's SMF ¶ 52; Cabral Dep. at 81-82.[39] Cabral asked Paul Williams why he had not come forward with this information previously, and he replied that he was not sure if it was related. *Id*.

Unsure of Aaron Williams' link, if any, to the investigation, Cabral later wrote him a brief letter asking him to contact Cabral. Defendant's SMF ¶ 53; Cabral Dep. at 82-83.[40] Cabral may have used the mail to contact Aaron Williams because he receives paperwork related to workers' compensation proceedings and he may have seen Williams' name on some of that documentation and believed it was the only way to contact him. Defendant's SMF ¶ 54; Plaintiff's Opposing SMF ¶ 54. At that point, Aaron Williams worked in IBC's bakery, and Cabral admits that he could have found out which shift he was working. Plaintiff's Additional SMF ¶ 47; Cabral Dep. at 83. However, Cabral did not call Williams up to his office but instead sent him a certified letter asking him to come to be interviewed. *Id*.[41]

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[38] IBC qualifies this statement, arguing, *inter alia*, that inasmuch as IBC's sexual-harassment policy requires supervisors to report complaints up the chain of command, it was not surprising that Cabral did not contact Shanholtz, who in any event has denied having had knowledge that Chaloult complained about Tran. *See* Defendant's Reply SMF ¶ 45.

[39] Chaloult objects to paragraph 52 of the Defendant's SMF on hearsay grounds, *see* Plaintiff's Opposing SMF ¶ 52; however, inasmuch as the statements in issue do not appear to be offered for the truth of the matter asserted, the objection is overruled.

[40] IBC further asserts that Aaron Williams failed to contact Cabral, *see* Defendant's SMF ¶ 53; however, Chaloult denies this, *see* Plaintiff's Opposing SMF ¶ 53; A. Williams Dep. at 18, and I view the cognizable evidence in the light most favorable to him.

[41] IBC qualifies this statement, arguing, *inter alia*, that a certified letter would have been a particularly effective means of contacting an employee who, like Aaron Williams, worked in a number of different departments in the bakery and whose shift differed from Cabral's. *See* Defendant's Reply SMF ¶ 47; A. Williams Dep. at 6, 19.

Aaron Williams received the letter. Plaintiff's Additional SMF ¶ 48; Defendant's Reply SMF ¶ 48. In response, he called Cabral using in-house phone voice mail on at least three occasions, but Cabral never got back to him. Plaintiff's Additional SMF ¶ 48; A. Williams Dep. at 18.[42] In November 2001, as Tran walked by Chaloult, he tried to give Chaloult a shoulder massage. Plaintiff's Additional SMF ¶ 17; Defendant's Reply SMF ¶ 17. Chaloult responded by pulling Tran down to the floor and telling him to sit there. Defendant's SMF ¶ 35; Plaintiff's Opposing SMF ¶ 35. When Chaloult's supervisor asked Tran why he was sitting on the floor, Chaloult answered for him, saying, "He's being a bad boy. He's being punished." *Id*. Chaloult realized his reaction to Tran was out of bounds. *Id*.

On or about November 23, 2001, while Chaloult cleaned the men's restroom, Tran approached him from behind, grabbed him just above the hips and simulated a sexual act while he moaned. Plaintiff's Additional SMF ¶18; Chaloult Aff. ¶ 6. Chaloult did not report this incident to his supervisor. Defendant's SMF ¶ 36; Chaloult Dep. at 66. Tran also attempted to play footsies with Chaloult. Plaintiff's Additional SMF ¶ 20; Chaloult Dep. at 64.[43] On another occasion, while Chaloult changed out of his clothes, Tran approached him from behind and ran his fingers from Chaloult's shoulders to the small of his back. Plaintiff's Additional SMF ¶ 22; Chaloult Aff. ¶ 6.[44]

In November 2001, Chaloult began therapy with Dumas. Plaintiff's Additional SMF ¶ 29; Defendant's Reply SMF ¶ 29. Dumas diagnosed Chaloult with major depression. *Id*.[45] He testified

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[42] IBC denies that Aaron Williams tried to contact Cabral or that Cabral received any voice-mail messages from him, *see* Defendant's Reply SMF ¶ 48; however, I view the cognizable evidence in the light most favorable to Chaloult.

[43] Chaloult's further assertions that this incident occurred in mid-November 2001 and that he had to kick Tran's feet away, *see* Plaintiff's Additional SMF ¶ 20, are disregarded inasmuch as they are neither admitted nor supported by the citation given.

[44] Chaloult's further assertions that this incident occurred in the fall of 2000 and that his shoulders were bare, *see* Plaintiff's Additional SMF ¶ 22, are disregarded inasmuch as they are neither admitted nor supported by his citation to his affidavit.

[45] IBC qualifies this statement, *see* Defendant's Reply SMF ¶ 29, noting that (i) nowhere in the cited testimony is there any indication this diagnosis is linked to the alleged harassment by Tran, *see* Deposition of Greg Dumas, LCSW ("Dumas Dep."), filed with S/J Motion, at 13-19, 37, 39; (ii) the plaintiff has a history of anxiety and depression, *see* Defendant's SMF ¶ 67; Plaintiff's Opposing SMF ¶ 67; and (iii) because of his prior history of depression, Chaloult was at a higher risk for suffering depression prior to the (*continued on next page*)

that Chaloult was very traumatized both by the events and the company's response to them. Plaintiff's Additional SMF ¶ 29; Dumas Dep. at 17. Because of Tran's harassment, Chaloult stopped changing into and out of his work clothes at work. Plaintiff's Additional SMF ¶ 29; Chaloult Aff. ¶ 10. Dumas believes Chaloult is a private man when it comes to sexuality and is more bothered and affected by events that may constitute sexual harassment than some other people would be. Defendant's SMF ¶ 68; Plaintiff's Opposing SMF ¶ 68. Chaloult is very sensitive to the subject of sexual harassment. *Id.*

Dumas asked for permission to call IBC. Plaintiff's Additional SMF ¶ 50; Defendant's Reply SMF ¶ 50.[46] Chaloult gave Dumas permission to call Cabral and a signed release to that effect. *Id*. Dumas's call to Cabral was an attempt to alert the company that this was an area of concern and to give IBC a heads-up in responding to Chaloult. *Id*. Dumas called Cabral on or about November 27, 2001. *Id*. Dumas identified himself to Cabral as Chaloult's licensed clinical social worker, told Cabral that there had been a couple of further instances that were continuing to be upsetting for his client, stated that he felt it was important that Chaloult not have any further contact with Tran and explored whether something could be done to help avoid such contact in the future. *Id*. ¶ 51.

Cabral told Dumas that he took the matter seriously and that Tran had already been warned. *Id*. ¶ 52.[47] Cabral also told Dumas his understanding of the complaint procedure – that employees are to report complaints to IBC's human resources office. Defendant's SMF ¶ 39; Plaintiff's Opposing SMF ¶ 39. Cabral did not indicate to Dumas that he would be calling Chaloult, nor did Dumas ask him to do so. *Id*. Cabral also told Dumas that IBC had not received any further reports of harassment

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occurrence of the alleged incidents, *see id.* ¶ 69. IBC's motion to strike portions of this statement on the ground that they are not supported by the citations given, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 29, is granted as to the first sentence ("The harassment described in Facts 13-28, which occurred from September of 2001through November 2001, had a serious effect upon the Plaintiff.") and otherwise denied.

[46] IBC's motion to strike paragraph 49 of the Plaintiff's Additional SMF on the ground that it is not supported by the citations given, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 49, is granted.

[47] IBC's motion to strike the second sentence of paragraph 52 of the Plaintiff's Additional SMF ("Cabral agreed to set it up so there was no further contact with between [sic] Cabral and Dumas") on the ground that it is not supported by the citations given, *see* Motion

(*continued on next page*)

by Tran. *Id*. ¶ 40. The purpose of the medical release Chaloult provided to Dumas was to notify IBC of the stress under which Chaloult was being placed and to consider options including work limitations. *Id*. ¶ 41. Dumas did not consider that he was reporting incidents of harassment on behalf of Chaloult. *Id*. Dumas did not provide specifics of any incidents in terms of details of the alleged harassment or dates on which it might have occurred. Defendant's SMF ¶ 42; Dumas Dep. at 10, 26-27.[48]

Based upon that conversation, Dumas assured Chaloult that IBC took allegations of harassment seriously, that IBC had already warned Tran about his behavior and that IBC wanted to hear if there were any further incidents of harassment. Defendant's SMF ¶ 38; Plaintiff's Opposing SMF ¶ 38. Cabral seemed both earnest and genuinely concerned. *Id*. Dumas strongly advised Chaloult on more than one occasion to report to IBC the other two alleged incidents of harassment referenced in paragraphs 35 and 36 of the Defendant's SMF. *Id*. ¶ 43. Dumas's expectation or hope was that after he had "paved the way" with Cabral, Chaloult would contact him. *Id*. Dumas indicated to Cabral that he would have Chaloult contact him. *Id*. Chaloult told Dumas that he would report these other incidents to IBC and set matters up so that he would have no further contact with Tran, but Chaloult did not do so. *Id*.

Cabral admits that subsequent to Dumas's call, he did not call Chaloult, contact Chaloult's supervisors or otherwise do anything to find out whether Chaloult was having any further problems with Tran. Plaintiff's Additional SMF ¶ 53; Defendant's Reply SMF ¶ 53.[49]

To Strike at 9; Defendant's Reply SMF ¶ 52, is granted.

[48] IBC further states that Dumas did not tell Cabral that (i) Chaloult had experienced further harassment other than the one incident of which Cabral was aware or (ii) had any other kind of problem with Tran, *see* Defendant's SMF ¶ 42; however, Chaloult denies this, *see* Plaintiff's Opposing SMF ¶ 42; Dumas Dep. at 10, 27, and I view the cognizable evidence in the light must favorable to Chaloult.

[49] IBC's motion to strike the last sentence of this statement ("In sum, there is no evidence that Defendant did anything after receiving Dumas' phone call.") on the ground that it is not supported by any record citation, *see* Motion To Strike at 9; Defendant's Reply SMF ¶ 53, is granted.

In February 2002 Tran was moved to a shift different than Chaloult's. Defendant's SMF ¶ 46; Chaloult Dep. at 72-73. Chaloult testified that although the touching by Tran essentially ended in November 2001, as of the date of his deposition (January 28, 2003) Tran still stared at him and followed him to the bathroom. Plaintiff's Additional SMF ¶ 23; Defendant's Reply SMF ¶ 23.[50] Chaloult also testified that if Tran went to the cafeteria, he would sit a couple of tables away and stare at Chaloult, and if Chaloult went to get a cup of coffee, Tran would continue to stare. *Id*. This bothered Chaloult. *Id*. Although Chaloult alleged that Tran subsequently inappropriately stared at him and followed him around, he never reported that to anyone in IBC's management. Defendant's SMF ¶ 48; Plaintiff's Opposing SMF ¶ 48. Other than the report to Jordan of the alleged inappropriate touching by Tran on September 21, Chaloult never reported any further inappropriate touching by Tran to Jordan, his union shop steward. *Id*. ¶ 49.[51]

Chaloult testified that his biggest concern after his meeting with Cabral and Paul Williams on September 21 was that he never heard back from IBC regarding actions taken to discipline or counsel Tran. *Id*. ¶ 70. Cabral denies that he told Chaloult at that meeting that he would update him regarding the investigation. *Id*. ¶ 71. Chaloult is also dissatisfied with the action taken by IBC against Tran as a result of its investigation into Tran's behavior. *Id*. ¶ 72. Chaloult wanted IBC either to punish Tran or have him apologize to Chaloult for what he had done. *Id*. Neither Chaloult nor anyone on his behalf ever came to Cabral after the September 28 meeting and asked how the investigation was proceeding; nor did Chaloult ever follow up with any other member of the company regarding the results of the

[50] IBC admits this was Chaloult's testimony but denies the substance of it on the ground that Chaloult also testified that after November 2001 he had no further problems with Tran. *See* Defendant's Reply SMF ¶ 23. For purposes of summary judgment, I resolve this conflict in the light most favorable to Chaloult.

[51] IBC further asserts that other than the meeting where he sought to put Bell "on notice" and the followup meeting with Cabral and Paul Williams, Chaloult did not report any other incidents involving Tran touching him to the company. *See* Defendant's SMF ¶ 47. Chaloult denies this, *see* Plaintiff's Opposing SMF ¶ 47, and I view the cognizable evidence in the light most favorable to Chaloult.

investigation. Defendant's SMF ¶ 73; Cabral Dep. at 117; Chaloult Dep. at 104.[52] Chaloult contacted IBC only once after the September 21 incident regarding Tran's behavior. Defendant's SMF ¶ 75; Plaintiff's Opposing SMF ¶ 75.

On March 12, 2002 Chaloult filed a charge with the MHRC alleging that he was being subjected to unwelcome sexual harassment because a male co-worker (presumably Tran) "routinely touches my buttocks in an uncomfortable sexual manner[.]" Defendant's SMF ¶ 91; MHRC Charge.[53] Chaloult did not have an attorney when he filed that charge. Plaintiff's Additional SMF ¶ 58; Chaloult Aff. ¶ 12.[54] IBC received notice of Chaloult's MHRC charge on April 12, 2002. Plaintiff's Additional SMF ¶ 62; Defendant's Reply SMF ¶ 62.

On April 9, 2002 IBC suspended Tran for three days as a result of an incident in which he grabbed his own crotch, swore and pushed a cart at a supervisor, Bell. Defendant's SMF ¶ 77; Plaintiff's Opposing SMF ¶ 77. The written notice of suspension issued to Tran warned that "similar incidents of this nature will not be tolerated by our employees and will subject you to termination of employment." *Id*.

On March 3, 2003, at a meeting attended by Tran, Morgano of human resources, interpreter Nga Primus and Tim Gilman, a steward for Tran's union, IBC confronted Tran with the details of complaints that had been made by Kim Anh Tran and Hoanh Nguyen. Defendant's SMF ¶ 80; Plaintiff's Opposing SMF ¶ 80. IBC had been informed that in November 2002 Kim Anh Tran, a

[52] In a denial that is more in the nature of a qualification and hence is treated as such, Chaloult states that he asked Cannell what was going on with the complaint. *See* Plaintiff's Opposing SMF ¶ 73; Chaloult Dep. at 93.

[53] IBC further asserts that (i) the only conduct complained of in the MHRC Charge was the touching of Chaloult's buttocks and (ii) the charge indicated that the earliest and latest date on which the touching occurred was September 21, 2001. *See* Defendant's SMF ¶ 91. Chaloult denies this, pointing out that (i) he also complained in his charge that other co-workers had been touched and (ii) the indication that September 21, 2001 was both the "earliest" and "latest" date of the conduct was an error, as shown by his description in the charge of the conduct as continuing and his allegation that he had been inappropriately touched routinely. *See* Plaintiff's Opposing SMF ¶ 91; MHRC Charge. Chaloult's description of the underlying MHRC charge document is accurate; in any event, for purposes of summary judgment, I resolve conflicts in evidence in favor of Chaloult.

[54] IBC denies this, *see* Defendant's Reply SMF ¶ 58; however, I view the cognizable evidence in the light most favorable to Chaloult.

female co-worker, encountered Tran waiting for her in the parking lot. Defendant's SMF ¶ 78; report of interview with Kim Ahn Tran dated Feb. 25, 2003 ("K. Tran Interview"), attached to Defendant Interstate Brands Corporation's Fourth Supplemental Response to Plaintiff's First Request for Production of Documents ("Defendant's Fourth Suppl."), at Bates No. IBC 0343.[55] He startled her, and she told him that she would call the police on her cell phone. *Id*. She locked her car's doors. *Id*. Tran followed her car, and she pulled into a gas station to evade him. Defendant's SMF ¶ 78; K. Tran Interview at Bates Nos. IBC 0343-44. Tran had previously asked her out; in each instance she had told him no and tried to ignore him. Defendant's SMF ¶ 78; K. Tran Interview at Bates No. IBC 0343. Tran had previously told her that he would kidnap her daughter if she had one because it would be the "next best thing" to having her. *Id*. Tran began to bother Kim Ahn Tran, who also is Vietnamese, in 2001. Plaintiff's Additional SMF ¶ 54; Defendant's Reply SMF ¶ 54. That same year, Kim Ahn Tran told her supervisor that Tran had been bothering her. *Id*.[56]

IBC also had been informed that in February 2003 Tran subjected Hoanh Nguyen, a female co-worker, to repeated and unwanted attention, culminating in Tran taking steps to delay her performance of her job. Defendant's SMF ¶ 79; report of interviews with Hoanh Nguyen and Tri Tran dated Feb.

[55] Chaloult objects to admission of evidence concerning Kim Anh Tran on two grounds: that it was not disclosed in a timely manner and that it constitutes inadmissible hearsay. *See* Plaintiff's Opposing SMF ¶ 78. The objection is overruled. The report was timely disclosed to Chaloult on or about March 27, 2003, within approximately one month after it surfaced. *See* Defendant's Fourth Suppl; K. Tran Interview. Further, IBC clarifies that it offers this evidence not for the truth of the matter asserted, but to show its actions once it learned of further harassing behavior by Tran and that he harassed both sexes. *See* Reply Memorandum ("S/J Reply") (Docket No. 26) at 5 n.6. To the extent IBC alternatively suggests, for the first time in its reply memorandum, that the testimony of the women is in fact admissible for the truth of the matter asserted pursuant to Federal Rule of Evidence 807 (the residual exception), *see id*., Chaloult's objection is sustained. IBC offers no evidence or argument that it gave Chaloult the sort of advance notice contemplated by that rule. *See* Fed. R. Evid. 807 ("[A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.").

[56] IBC's motion to strike the last sentence of paragraph 54 of the Plaintiff's Additional SMF ("Defendant did not take any corrective action or investigated [sic] the allegations until two years later."), as well as the majority of paragraph 55, on the ground that the statements made therein are not supported by the citations given, *see* Motion To Strike at 9; Defendant's Reply SMF ¶¶ 54-55, is granted.

25, 2003 ("Nguyen Interview"), attached to Defendant's Fourth Suppl., at Bates No. IBC 0345.[57] This enraged Hoanh, and she screamed at Tran. *Id.* Tri Tran (Hoanh's brother-in-law, a supervisor) confirmed these events and noted that he had verbally warned Tran in February to stop teasing Hoanh. *Id*.

At the March 3, 2003 meeting Tran confirmed that he had received, understood and been reminded about the company's harassment-prevention policy. Defendant's SMF ¶ 80; Plaintiff's Opposing SMF ¶ 80. He admitted to the majority of the comments and incidents about which these two co-workers had recently complained. *Id*. His only excuse was that he had been joking. *Id*.

In IBC's opinion, Tran's repeated violation of company policy despite a progressive series of counselings and warnings established that he was unwilling to comply with and had willfully violated company policy, despite making commitments not to do so. *Id*. ¶ 81. Because of this, IBC terminated his employment effective March 27, 2003. *Id*.

In the report resulting from his investigation into Chaloult's charge, the MHRC investigator referenced only two incidents of alleged harassment, the September 21 incident and the incident prior to that time (described in paragraphs 14-15 of the Complaint). Defendant's SMF ¶ 93; MHRC Investigator's Report dated Aug. 9, 2002 ("MHRC Investigator's Report"), attached as Exh. 4 to Kline Aff., at 2, 5.[58] Chaloult did not amend his charge or file one subsequent to the one filed on March 12, 2002. Defendant's SMF ¶ 94; Plaintiff's Opposing SMF ¶ 94.[59] After receiving notice from the MHRC that he could submit written materials disagreeing with the investigator's report, Chaloult did

[57] Chaloult lodges the same objection to this evidence as to IBC's evidence concerning Kim Anh Tran. *See* Plaintiff's Opposing SMF ¶ 79. The objection is overruled for the same reasons. *See* Defendant's Fourth Suppl.; Nguyen Interview; S/J Reply at 5 n.6.

[58] Chaloult's objection to the MHRC investigative report as irrelevant and inadmissible, *see* Plaintiff's Opposing SMF ¶ 93, is overruled. The report is relevant to analysis of whether Chaloult exhausted his remedies.

[59] IBC further asserts that attorney Ronald R. Coles represented Chaloult before the MHRC. *See* Defendant's SMF ¶ 95; Kline Aff. ¶ 3 & Exh. 3 thereto. IBC's materials do indeed indicate that Coles represented Chaloult in that matter as of July 25, 2002, *see id.*; however, they do not undercut Chaloult's assertion that he represented himself as of the time of the filing of the charge (in March 2002).

not submit any written materials alleging incidents of harassment by Tran in addition to those mentioned in the investigator's report. Defendant's SMF ¶ 96; Kline Aff. ¶ 9; & Exh. 5 thereto.[60] On September 27, 2002 Chaloult received a notice of dismissal of his MHRC charge and authorization to file suit in Superior Court. Plaintiff's Additional SMF ¶ 67; Chaloult Aff. ¶ 14 & Exh. 3 thereto.

The instant suit was filed in the Maine Superior Court (York County) on November 4, 2002 and removed to this court on the basis of diversity of citizenship on December 11, 2002. *See* Docket Record, attached as Exh. 8 to Affidavit of Robert W. Kline (Docket No. 3); Notice of Removal. Chaloult is not claiming lost wages or income in this lawsuit. Defendant's SMF ¶ 87; Plaintiff's Opposing SMF ¶ 87. The Complaint describes five instances of direct harassment of Chaloult by Tran in addition to the September 21 incident: that prior to the September 21 incident Tran felt Chaloult's buttocks (undated), that Tran touched his back (undated), that Tran attempted to play footsies with him (November 19, 2001), that Tran grabbed him above the hips (November 23, 2001) and that Tran tried to step on his foot and touched his chest (summer 2002). Defendant's SMF ¶ 92; Complaint ¶¶ 14-19.[61]

III. Analysis

In his two-count complaint, Chaloult alleges that IBC maintained a hostile work environment stemming from Tran's conduct and failed to take the requisite prompt action to remedy the situation, in violation of the Maine Human Rights Act ("MHRA"). Complaint ¶¶ 21-28. IBC seeks (i) dismissal of Chaloult's claims to the extent predicated on facts set forth in paragraphs 16-19 of the Complaint, on the basis of failure to exhaust MHRC remedies as to those claims, (ii) judgment as a matter of law or dismissal of all of Chaloult's claims on the ground of failure to plead or to establish compliance

[60] Chaloult's objection to this statement on grounds of relevancy, *see* Plaintiff's Opposing SMF ¶ 96, is overruled.

[61] As Chaloult points out, the complaint also alleges the existence of a hostile work environment generally. *See* Plaintiff's Opposing SMF ¶ 92; Complaint ¶¶ 8-19.

with 5 M.R.S.A. § 4622(1), (iii) judgment as a matter of law on the basis of failure to raise a triable issue concerning the promptness and appropriateness of IBC's remedial action, (iv) judgment as a matter of law on the ground that Chaloult cannot show that the alleged harassment was gender-based, and (v) judgment as a matter of law on the basis of failure to raise a triable issue whether the alleged harassment was severe and pervasive enough to alter the conditions of Chaloult's employment or create an abusive work environment. *See* S/J Motion at 1-2. I address each of these five points, none of which I find persuasive, in turn.[62]

A. Exhaustion of Remedies

IBC first argues that Chaloult failed to exhaust his remedies at the MHRC level with respect to certain incidents alleged in his Complaint. *See id*. at 11-15. "Like Title VII, the MHRA requires that a plaintiff file a discrimination claim at the agency level before proceeding to court." *Bishop v. Bell Atl. Corp*., 299 F.3d 53, 58 (1st Cir. 2002); *see also* 5 M.R.S.A. §§ 4611, 4622. This requirement exists "to provide the employer with prompt notice of the claim and to create an opportunity for early conciliation." *Lattimore v. Polaroid Corp*., 99 F.3d 456, 464 (1st Cir. 1996).

There is no dispute in this case that Chaloult in fact did file a charge with the MHRC on March 12, 2002. However, IBC contends, as an initial matter, that inasmuch as Chaloult charged only that a male co-worker touched his buttocks and indicated that the conduct both began and ended on September 21, 2001, he has exhausted his MHRC remedies only with respect to that single incident. *See* S/J Motion at 12. In so arguing, IBC seeks to hang Chaloult, who filed the charge *pro se*, on a technicality.[63] Chaloult did indeed indicate that the harassment both began and ended on September

[62] As IBC observes, recourse to federal caselaw is appropriate in construing the MHRC, which "is interpreted under a standard identical to that applicable to claims asserted under its federal counterpart, 42 U.S.C. § 2000e-2, with respect to the necessary elements of claims of discrimination." S/J Motion at 10 n.2 (quoting *Martin*, 2003 WL 1712510, at *8 n.5).

[63] Chaloult subsequently obtained legal representation with respect to his MHRC claim; however, what matters for this purpose is that he was *pro se* at the time of the charge filing.

21, 2001. *See* MHRC Charge at 1. However, one can only sensibly conclude that this was a mistake. Chaloult also checked a box describing the harassment as "continuing action" and stated that the unnamed co-worker "routinely" touched his buttocks in an uncomfortable sexual manner and "touches other employees inappropriately[.]" *See id*.

Under the circumstances, both the MHRC and IBC were put on adequate notice that the claim encompassed more than a single incident. Exhaustion doctrine simply is not as harsh as IBC would have it; an obvious drafting error on an agency discrimination-reporting form by a *pro se* complainant does not bar the courthouse doors to his claims. *See, e.g., Lattimore*, 99 F.3d at 464 ("In cases where, as here, an employee acts *pro se*, the administrative charge is liberally construed in order to afford the complainant the benefit of any reasonable doubt."); *see also, e.g., Duggins v. Steak `N Shake, Inc.*, 195 F.3d 828, 831-33 (6th Cir. 1999) (holding that, although defendants made much of fact that plaintiff omitted to check box marked "retaliation" on one-page EEOC charge form, "[w]here the plaintiff alleged facts to the EEOC which clearly included retaliation allegations, even though those facts were relayed through an affidavit, and where that plaintiff was not represented by legal counsel in writing her one-page EEOC charge, such a plaintiff should not be precluded from bringing a retaliation claim in the complaint.").

IBC alternatively contends that inasmuch as the MHRC investigator assigned to Chaloult's case referenced only two harassment incidents – the September 21 incident and the earlier incident – Chaloult exhausted his remedies only with respect to claims predicated on those two events. *See* S/J Motion at 13-15. As IBC notes, *see id*. at 13, the First Circuit follows the "scope of the investigation test," pursuant to which, "in employment discrimination cases, the scope of the civil complaint is limited by the charge filed with the [agency] and the investigation which can reasonably be expected to grow out of that charge," *Lattimore*, 99 F.3d at 464 (citations and internal punctuation omitted).

IBC asserts that Chaloult "cannot argue that the events at ¶¶ 16-18 of his Complaint could have reasonably grown out of the investigation of his charge, because the results of the actual investigation establish categorically that they did not." S/J Motion at 14. Again, however, the test is not that narrow. As the First Circuit has observed, "Of course it is not the scope of the actual investigation pursued that determines what complaint may be filed, but what [agency] investigation could reasonably be expected to grow from the original complaint." *Powers v. Grinnell Corp.*, 915 F.2d 34, 39 n.4 (1st Cir. 1990) (citations and internal quotation marks omitted).[64]

Paragraphs 16 through 18 of the Complaint allege that (i) one evening, after Chaloult had taken his shirt off while changing out of his work clothes, Tran approached him from behind and ran his hand from Chaloult's shoulders to the small of his back, (ii) on or about November 19, 2001 Tran attempted to play footsies with Chaloult, and (iii) on or about November 23, 2001 Tran approached Chaloult from behind, grabbed him just above the hips and simulated a sexual act while he moaned. *See* Complaint ¶¶ 16-18. All of these incidents are part of Tran's asserted pattern or practice of inappropriate, sexually nuanced touching of co-workers (including Chaloult) and, thus, all fall within the scope of an investigation that reasonably could be expected to have grown from Chaloult's MHRC charge.

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[64] IBC relies heavily on a more recent First Circuit case, *Clockedile v. New Hampshire Dep't of Corr.*, 245 F.3d 1 (1st Cir. 2001), in which the court observed, "In its favor, the [scope of the investigation] test, where it refers to an *actual* investigation by the agency, correlates fairly well with the dual aims of the statutory scheme: to give the agency a chance to conciliate (the exhaustion goal) and to provide quick notice to the employer (the statute of limitations goal). The test, however, becomes disconnected from these justifications where – as often seems to be the case – the agency does not investigate," *id*. at 5 (citations omitted) (emphasis in original). *See* S/J Motion at 13. This dictum cannot reasonably be read as signaling a departure from the maxim that an agency need not actually have investigated (or, for that matter, even have been made aware of) a specific incident for it to fall within the "scope of the investigation" test. The *Clockedile* court held only that "retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency[.]" *Id*. at 6. The court pointedly stated, "In adopting this rule, we take no position on the proper rule for non-retaliation claims. As already noted, the courts are far more divided, and the law more confused, on how to handle situations in which a plaintiff advances in court claims based on additional acts of discrimination or alternative theories that were never presented to the agency. The circumstances vary widely; and perhaps no simply stated rule neatly resolves all problems." *Id*.

IBC finally targets paragraph 19 of the Complaint, in which Chaloult alleges that in the summer of 2002 Tran walked up to him, tried to step on his foot and ran his fingers across Chaloult's chest. *See* S/J Motion at 14; Complaint ¶ 19. IBC argues that this claim not only did not grow out of the MHRC investigation but also could not even theoretically have done so given its timing. *See* S/J Motion at 14. As this court has noted, "The law is somewhat unsettled about whether the Complaint may rely on events that occurred *after* the MHRC charge was filed." *Greenier v. PACE, Local No. 1188*, 201 F. Supp.2d 172, 181 (D. Me. 2002) (emphasis in original). However, the court has held an MHRC claim to have been exhausted when the underlying post-filing event occurred while the agency investigation "was still ongoing" and "could have come to light during that investigation." *Id. Accord Butler v. Matsushita Communication Indus. Corp. of U.S.A.*, 203 F.R.D. 575, 581 (N.D. Ga. 2001) ("Because the original charge alleged discriminatory denials of promotions, the investigation into MCUSA could reasonably be expected to include investigation of future denials of promotions as long as the case was still pending before the EEOC.").

As IBC notes, the MHRC investigator's report in this case issued on August 9, 2002. *See* S/J Motion at 14; MHRC Investigator's Report. Chaloult was given seventeen days from that date to respond to the MHRC's "preliminary investigation," and his case was scheduled to appear on the MHRC's September 23, 2002 agenda. *See* Letter dated Aug. 9, 2002 from Patricia E. Ryan to Mr. Raymond J. Chaloult, Sr., attached as Exh. 5 to Kline Aff. The MHRC issued a right-to-sue letter on September 25, 2002. *See* Letter dated Sept. 25, 2002 from Patricia E. Ryan to Raymond J. Chaloult, attached as Exh. 3 to Chaloult Aff. Thus, it is a fair inference that the alleged "summer 2002" incident, which again was part of the same pattern and practice of inappropriate sexually nuanced touching by Tran, could have come to light during the pendency of the MHRC investigation.

For these reasons, IBC fails to demonstrate entitlement to dismissal of Chaloult's claims predicated on paragraphs 14 or 16 through 19 of the Complaint on the basis of failure to exhaust remedies.

B. Compliance with 5 M.R.S.A. § 4622(1)

IBC next seeks dismissal of the Complaint, or judgment as a matter of law, on the basis that Chaloult failed to plead compliance with 5 M.R.S.A. § 4622(1). *See* S/J Motion at 15-17; S/J Reply at 2-3. The statute in question provides, in relevant part:

> **1. Limitation.** Attorney's fees under section 4614 and civil penal damages or compensatory and punitive damages under section 4613 may not be awarded to a plaintiff in a civil action under [the MHRA] unless the plaintiff alleges and establishes that, prior to the filing of the civil action, the plaintiff first filed a complaint with the [MHRC] and the commission either:
>
> **A.** Dismissed the case under section 4612, subsection 2;
>
> **B.** Failed, within 90 days after finding reasonable grounds to believe that unlawful discrimination occurred, to enter into a conciliation agreement to which the plaintiff was a party;
>
> **C.** Issued a right-to-sue letter under section 4612, subsection 6 and the action was brought by the aggrieved person not more than 2 years after the act of unlawful discrimination of which the complaint was made as provided in section 4613, subsection 2, paragraph C; or
>
> **D.** Dismissed the case in error.

5 M.R.S.A. § 4622(1).

IBC seeks dismissal on the basis that the Complaint is devoid of any allegation that Chaloult filed a charge with the MHRC, noting that Chaloult failed to amend the Complaint to so allege even after having been put on notice (by virtue of IBC's answer and affirmative defenses) that IBC intended to press this pleading issue. *See* S/J Reply at 2-3. IBC clarifies in its reply memorandum, "The issue is not one of 'proof' as Plaintiff mistakenly suggests, but one of pleading." *Id*. at 2 n.3 (citation omitted).

Section 4622(1) bars the award of civil penal damages, attorney fees or compensatory or punitive damages unless an MHRA plaintiff "alleges and establishes" the filing and disposition of an MHRC charge. Chaloult's complaint does not "allege" these things, nor does he append a copy of any MHRC document thereto. *See generally* Complaint. However, the record "establishes" that in fact he filed an MHRC charge and obtained a right-to-sue letter.[65] Under the circumstances, the question presented is whether a plaintiff's pleading omission bars him or her from obtaining a panoply of MHRA remedies when, in fact, the plaintiff has fulfilled the underlying MHRC requirements. My research unearths no Law Court (or other court) case testing the limits of section 4622(1) in circumstances such as this. Federal court – the forum to which IBC removed this case – is not a hospitable venue in which to seek to "blaze new and unprecedented jurisprudential [state-law] trails." *Andrade v. Jamestown Hous. Auth.*, 82 F.3d 1179, 1187 (1st Cir. 1996) (citation and internal quotation marks omitted).

In any event, I find caselaw cited by Chaloult instructive. *See* Plaintiff's Memorandum in Support of It's [sic] Opposition to Defendant's Motion for Summary Judgment/Motion To Dismiss ("S/J Opposition") (Docket No. 21) at 11 n.2 (citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Baltzer v. City of Sun Prairie/Police Dep't*, 725 F. Supp. 1008 (W.D. Wis. 1989)). In *Baltzer*, the plaintiffs failed to plead that they had first filed a claim with the EEOC; however, it was undisputed that they had in fact done so. *See Baltzer*, 725 F. Supp. at 1016. The court denied the defendants' motion to dismiss for failure to plead fulfillment of conditions precedent, holding:

> Where, as here, it is undisputed that the condition precedent has been fulfilled, the court's jurisdiction is not in question, and defendants have not been prejudiced by plaintiffs' failure to plead fulfillment of the condition precedent, dismissal is not warranted. Thus, although it would have been the better practice for plaintiffs to have

[65] The MHRC documents in question are cognizable for purposes of Rule 12(b)(6) analysis as "official public records" or "documents central to plaintiffs' claim." *See Alternative Energy*, 267 F.3d at 33. In any event, IBC alternatively moves for summary judgment as to this point, *see* S/J Motion at 1, and these documents are part of the cognizable summary judgment record.

> amended their complaint to plead fulfillment of the condition precedent and thus avoid the necessity for briefing and decision of this issue, I will deny defendants' motion[.]

Id. at 1017 (citations omitted). Similarly, in this case, although Chaloult should have moved to amend his complaint to allege compliance with section 4622(1), there is no question that he did file an MHRC charge and receive a right-to-sue letter and there is no issue of prejudice to IBC. I am unwilling to surmise that, under the circumstances, the Law Court would construe section 4622(1) in such a manner as to hold his pleading deficiency fatal to his case.[66]

IBC makes two brief alternative arguments, seeking summary judgment with respect to, or dismissal of, (i) Chaloult's claim for punitive damages "on the alternate ground that Plaintiff has not pled the prerequisite for asserting a claim for punitive damages which requires proof that Defendant engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the rights of an aggrieved individual," and (ii) Chaloult's claims to the extent based on paragraphs 16 through 19 of the Complaint on the basis that, with respect to those alleged incidents, he failed to comply with section 4622(1). *See* S/J Motion at 16 n.5 & 17 n.9.

Inasmuch as the first point can only reasonably be construed as a motion to dismiss, and Chaloult makes no response whatsoever to it, *see generally* S/J Opposition, he effectively waives any objection to it, *see* Loc. R. 7(b); *compare, e.g., Carlson v. Rent-a-Center, Inc*., 237 F. Supp.2d 114, 116 (D. Me. 2003) ("It is well-established law in this district that Fed. R. Civ. P. 56 requires the Court to examine the merits of a motion for summary judgment even though a nonmoving party fails to object as required by [the] Local Rule[s].") (citation and internal quotation marks omitted). As to the second point, IBC incorporates and relies its failure-to-exhaust argument, *see* S/J Motion at 17 n.9, which I reject for the same reasons discussed above.

[66] Although non-compliance with section 4622(1) technically results only in the forfeiture of certain remedies, the loss of those remedies has been held sufficient to moot a plaintiff's case. *See, e.g., Gordan v. Cummings*, 756 A.2d 942, 944-45 (Me. 2000).

IBC accordingly fails to demonstrate entitlement to dismissal of the Complaint or summary judgment on the basis of non-compliance with 5 M.R.S.A. § 4622(1), although I recommend, on the basis of Chaloult's waiver, that its motion to dismiss Chaloult's claim for punitive damages be granted.

C. IBC's Remedial Action

IBC next seeks summary judgment on the basis that Chaloult fails to raise a triable issue with respect to the promptness and appropriateness of the remedial actions it took regarding Tran. *See* S/J Motion at 17-26.

"To establish employer liability for a non-supervisory co-employee, a plaintiff must demonstrate that the employer knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate action[.]" *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 401 (1st Cir. 2002) (citations and internal quotation marks omitted).

A complaint to a person designated by company policy to receive complaints of sexual harassment constitutes actual notice to an employer. *See, e.g., Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000). In addition, "employer liability could attach if information of the harassment had come to the attention of someone who is reasonably believed to have a duty to pass on the information." *Crowley*, 303 F.3d at 403 (citation and internal quotation marks omitted). "Notification of sexual harassment to an employer need not come solely from the victim of the harassment for knowledge to be imputed to the employer." *Id*. at 402 (citation and internal quotation marks omitted). Constructive knowledge arises if "the harassment was so severe and pervasive that management should have known of it." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002).

Viewing the cognizable evidence in the light most favorable to Chaloult, and drawing all reasonable inferences therefrom in his favor, I conclude there is a triable issue whether IBC took prompt, appropriate remedial action with respect to the harassment about which it had actual or constructive knowledge. The facts are sharply disputed. A trier of fact crediting Chaloult's version of events and drawing all reasonable inferences in his favor could find that:

1. Per IBC's anti-harassment policies, supervisors were designated to receive sexual-harassment complaints. Those supervisors, in turn, were expected to report such complaints immediately to the human resources department or the plant general manager. Thus, a report to a supervisor, the human resources department or the plant general manager conveyed actual knowledge to IBC.

2. IBC had actual knowledge as of the following times of the following allegations: (i) in summer 2001, via Aaron Williams' initial report to supervisor Shanholtz, that Tran was inappropriately touching Williams and making obscene gestures; (ii) in September 2001, via Aaron Williams' report to supervisors Bell and Daly, that Tran was a continuing problem; (iii) on September 21, 2001, via Chaloult's report to supervisor Bell, that Tran had touched his buttocks; (iv) on September 23 or 24, 2001, via the collective report of Jordan, Mayberry and Chaloult to assistant human resources manager Cabral, that an unnamed employee was sexually harassing Mayberry and Chaloult; (v) on September 28, 2001, via separate interviews with Cabral, that McCoy had had multiple run-ins with Tran, including instances in which Tran made obscene gestures to McCoy, and that Tran had inappropriately touched Mayberry's and Chaloult's buttocks and had behaved obscenely (the mustard incident) in Mayberry's presence; (vi) in November 2001, via Dumas's phone conversation with Cabral, that there had been two more recent (unspecified) incidents involving Chaloult and Tran that were very upsetting to Chaloult; and (vii) between September 2001 and

February 2002, via at least two additional reports by Aaron Williams to Shanholtz, that Tran was continuing to touch Williams and make obscene gestures.

3. Tran's conduct in the summer and fall of 2001 – including events not officially reported to management – sufficed to put IBC on constructive notice of a serious sexual-harassment problem involving Tran. Tran targeted a number of co-workers, including Kim Anh Tran, Aaron Williams, McCoy, Mayberry and Chaloult. He even sexually harassed supervisor Shanholtz. His conduct was flagrant, highly offensive and sometimes occurred in contexts in which it would have been witnessed or overheard, such as the changing room, the cafeteria and Shanholtz's office. Co-workers began to talk about it among themselves, and even supervisor Shanholtz discussed it.[67]

4. IBC's response to Aaron Williams' initial complaints was seriously inadequate, facilitating Tran's subsequent harassment of Chaloult. Neither Shanholtz, Bell nor Daly passed Williams' complaints along to the human resources department, as they were obliged by company policy to do. At the behest of union shop steward Cannell, Shanholtz met with Tran. However, Shanholtz merely counseled Tran that touching others was inappropriate. No investigation was undertaken into Williams' complaints, and no further action against Tran was taken or even threatened. Shanholtz told Williams he would no longer have to work with Tran; however, after one week, he again assigned the two to work together. When Williams inquired why this had happened, Shanholtz told him that was the way it was going to be. All of Williams' subsequent complaints concerning Tran fell on deaf ears. For example, when Williams responded to Cabral's certified letter requesting an interview, leaving voice mails for Cabral on at least two occasions, Cabral did not get back to him.

[67] IBC cites *Farley v. American Cast Iron Pipe Co.*, 115 F.3d 1548, 1553-54 (11th Cir. 1997), for the proposition that an employer defeats a finding of constructive notice by demonstrating the existence of a valid, effective and well-disseminated anti-harassment policy and the exercise of reasonably diligent efforts to adhere to that policy. *See* S/J Motion at 22-23. Assuming *arguendo* that the First Circuit would follow the *Farley* test, Chaloult adduces sufficient evidence to raise a triable question whether IBC made reasonably diligent efforts to adhere to its policy.

5. Cabral did indeed respond swiftly when apprised of the Mayberry, Chaloult and McCoy complaints in late September 2001. However, his investigation ended after speaking with the complainants and Tran (who denied the accusations), counseling Tran and warning Tran to stay away from the complainants. No translator was present at the meeting with Tran, who had some difficulty comprehending English. Cabral made no credibility determinations, asked none of the complainants if they were aware of any harassment beyond that mentioned in their written reports, and did not speak with any of Tran's or the complainants' supervisors. One could reasonably infer that had he made this additional modest effort, he would have become aware of Aaron Williams' prior complaints, underscoring the necessity to make a credibility determination and, in the event he determined the complainants' reports credible, take sterner measures with Tran.[68]

6. Although Mayberry and McCoy had no further problems with Tran after September 28, 2001, Chaloult was subjected to continuing harassment. Dumas's November 2001 phone call to Cabral sufficed to put IBC on notice that the harassment continued. Dumas provided no detail concerning the further incidents, did not intend to make a sexual-harassment report and indicated that Chaloult himself would be making such a report. Nonetheless, in view of the history of complaints against Tran, IBC should have taken steps to follow up when no report from Chaloult was forthcoming.

In short, Chaloult adduces sufficient evidence to raise a triable issue whether IBC responded sufficiently promptly and appropriately to the harassment complaints of which it had actual or constructive knowledge. Even granting that "an employer need not prove success in preventing harassing behavior in order to demonstrate that it exercised reasonable care in preventing and correcting sexually harassing conduct," *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62,

[68] Although, as IBC points out, measures such as counseling and warning can constitute an adequate disciplinary response, *see* S/J Motion at 25; *Star v. West*, 237 F.3d 1036, 1039 (9th Cir. 2001), one crediting Chaloult's evidence could find that IBC was aware such measures had failed in curbing Tran's conduct when assayed in connection with Aaron Williams' allegations, putting it on notice, (*continued on next page*)

72 (2d Cir. 2000) (citation and internal punctuation omitted), a trier of fact could find that IBC did not exercise reasonable care in preventing and correcting Tran's harassment in this case. IBC accordingly fails to demonstrate entitlement to summary judgment on this basis.

D. "Equal Opportunity Harasser" Defense

IBC next raises the so-called "equal opportunity harasser" defense, asserting that inasmuch as Tran harassed both men and women, his conduct was gender-neutral and non-actionable on sexual-harassment grounds. *See* S/J Motion at 26-29; *see also, e.g.*, *Reed v. MBNA Mktg. Sys., Inc*., 231 F. Supp.2d 363, 370 (D. Me. 2002), *vacated on other grounds*, 333 F.3d 27 (1st Cir. 2003) ("The critical issue [in a sex-based hostile work environment case] . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. To establish that the harassing conduct is based on sex, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment.") (citations and internal quotation marks omitted). Chaloult protests that IBC waived this defense by failing to assert it prior to moving for summary judgment and, in any event, the defense falters on the merits. *See* S/J Opposition at 13-16. I agree.

Per Federal Rule of Civil Procedure 8(c), "any . . . matter constituting an avoidance or affirmative defense" normally is deemed waived unless raised in the answer. Fed. R. Civ. P. 8(c); *see also, e.g., Davignon v. Clemmey*, 322 F.3d 1, 15 (1st Cir. 2003). The rule "is designed to provide plaintiffs with adequate notice of a defendant's intention to litigate an affirmative defense, thereby affording an opportunity to develop any evidence and offer responsive arguments relating to the defense." *Id*. In keeping with this spirit, the First Circuit has carved out exceptions to the waiver rule when "(i) the defendant asserts [the defense] without undue delay and the plaintiff is not unfairly

as of the time of the Chaloult/Mayberry/McCoy complaints, that sterner measures were warranted.

prejudiced by any delay, or (ii) the circumstances necessary to establish entitlement to the affirmative defense did not obtain at the time the answer was filed," in which case the party may move to amend its answer. *Id*. (citations omitted); *see also, e.g., Depositors Trust Co. v. Slobusky*, 692 F.2d 205, 208-09 (1st Cir. 1982) ("where an affirmative defense is not raised in the pleadings, for whatever reason, the party's remedy lies through an amendment of the pleadings").

IBC has never moved to amend its answer to assert the "equal opportunity harasser" defense.[69] While it did timely make Chaloult aware of its receipt of new reports of harassment by female employees, *see* S/J Reply at 5-6; Defendant's Fourth Suppl.; K. Tran Interview; Nguyen Interview, there is no evidence that it notified Chaloult even informally, prior to the filing of the instant dispositive motion on May 1, 2003, that it would be pressing an additional defense premised on that new information. Chaloult asserts that he has been extremely prejudiced in that he deposed one of the two female complainants, Kim Anh Tran, without the benefit of any knowledge that IBC intended to interpose the equal-opportunity-harasser defense, and he judged it unimportant to depose the second one. *See* S/J Opposition at 14-15. Under the circumstances, Chaloult's complaints of prejudice ring true. Inasmuch as Chaloult has been prejudiced, IBC should be held to have waived the equal-opportunity-harasser defense. *Compare, e.g., Boston Hides & Furs, Ltd. v. Sumitomo Bank, Ltd.*, 870 F. Supp. 1153, 1162 n.6 (D. Mass. 1994) ("If the plaintiff receives notice of an affirmative defense other than through the pleadings, the defendants' failure to comply with Fed. R. Civ. P. 8(c) does not cause the plaintiff any prejudice."); *G.D. v. Westmoreland Sch. Dist*., 783 F. Supp. 1532, 1534 (D.N.H. 1992) ("[A]bsent prejudice to the plaintiff, a defendant may raise an affirmative defense for the first time in a motion for summary judgment.").

[69] IBC does not contest that the "equal opportunity harasser" defense qualifies as an affirmative defense or avoidance for purposes of Rule 8(c). *See* S/J Reply at 5-6.

In any event, even were this affirmative defense not waived, I agree with Chaloult that IBC falls short of proving its entitlement to summary judgment on the merits of the defense. The women's accounts are hearsay to the extent offered for the truth of the matter asserted; they thus are not cognizable to show that Tran in fact inflicted the harassment described. Moreover, even assuming *arguendo* that they were admissible for that purpose, Chaloult makes a sufficiently compelling argument that Tran's abusive treatment of men differed in kind and degree from his abusive treatment of women to avoid summary judgment against him as to this defense.

As Chaloult points out, the mere fact that a harasser targets both men and women is not dispositive. *See* S/J Opposition at 15; *Beard v. Flying J, Inc.*, 266 F.3d 792, 798 (8th Cir. 2001) ("A plaintiff in this kind of case need not show . . . that only women were subjected to harassment, so long as she shows that women were the primary target of such harassment."); *Brown v. Henderson*, 257 F.3d 246, 254 (2d Cir. 2001) ("[T] he inquiry into whether ill treatment was actually sex-based discrimination cannot be short-circuited by the mere fact that both men and women are involved. For it may be the case that a co-worker or supervisor treats both men and women badly, but women worse.").

A trier of fact, viewing the evidence in the light most favorable to Chaloult, could find that Tran primarily targeted men (five men – Aaron Williams, McCoy, Mayberry, Chaloult and Shanholtz, versus two women) and that his *modus operandus* was different with men than with women. He touched only men inappropriately, and reserved obscene gestures only for them. While stalking a woman certainly is serious and threatening conduct, one cannot fairly describe Tran's humiliating and degrading physical assaults on men as less serious, as IBC does. *See* S/J Motion at 27-28. In short, Chaloult adduces sufficient evidence to support an inference that the harassment of which he complains would not have occurred but for his gender. *Compare, e.g, Bowen v. Department of*

Human Servs., 606 A.2d 1051, 1053-54 (Me. 1992) (workplace conduct in issue, including pervasive vulgar language directed at, and used by, both sexes, "was not sexual in nature and Bowen failed to generate any factual issue that would support an inference that it would not have occurred but for her gender."). IBC thus falls short of demonstrating its entitlement to summary judgment on this ground.

E. Existence of Hostile Work Environment

IBC finally argues that it is entitled to summary judgment on the basis of Chaloult's failure to adduce sufficient evidence to raise a triable issue as to whether he was subjected to a hostile work environment. *See* S/J Motion at 29-33.

To succeed on a hostile work environment claim a plaintiff must demonstrate, *inter alia*, "that the harassment was so severe or pervasive as to alter the terms of her employment, creating a work environment that was both objectively hostile and perceived as hostile by [the plaintiff] herself." *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 16 (1st Cir. 2002) (citations and internal quotation marks omitted). As the First Circuit has elaborated:

> There is no mathematically precise test for determining when conduct in the workplace moves beyond the merely offensive and enters the realm of unlawful discrimination. Rather, the question whether the environment is objectively hostile or abusive must be answered by reference to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. Subject to some policing at the outer bounds, it is for the jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt that it affected the conditions of her employment.

Id. at 18-19 (citations and internal quotation marks omitted); *see also, e.g., Nadeau v. Rainbow Rugs, Inc*., 675 A.2d 973, 976 (Me. 1996) ("The standard contemplates conduct that is either severe or pervasive. Although the conduct may be both, only one of the qualities must be proved in order to prevail. The severity of the conduct may vary inversely with its pervasiveness. Whether the conduct

is so severe as to cause the environment to become hostile or abusive can be determined only by considering all the circumstances, and this determination is left to the trier of fact.").

Viewing the cognizable evidence in the light most favorable to Chaloult and drawing all reasonable inferences therefrom, a trier of fact reasonably could find that the harassment of which Chaloult complains was:

1. Frequent, involving not only six instances in which Tran inappropriately touched Chaloult but also a pattern of attacks on and lewd gestures toward other men at IBC, which Chaloult contemporaneously either was informed of, overheard or personally observed. Even after November 2001, Tran continued to stare at Chaloult and follow him around.

2. Severe, involving, at its worst, highly offensive physical assaults such as the incident in which Tran grabbed Aaron Williams by the penis and buttocks and the November 2001 incident in which Tran grabbed Chaloult above the hips and simulated a sexual act while he moaned.

3. Humiliating, involving not "mere offensive utterances" but, rather, repeated, disturbing physical attacks and sickeningly lewd displays, such as the mustard incident.

4. A source of interference with Chaloult's work performance, causing him to refrain from changing his clothes at work.

In short, the cognizable evidence places the hostile-environment question in this case squarely in the gray zone of judgment calls appropriately reserved to a trier of fact rather than in the "outer bounds," where it would be subject to "policing" by way of resolution on summary judgment. IBC accordingly fails to demonstrate entitlement to summary judgment on this ground.

IV. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part IBC's motion to strike, recommend that its motion to dismiss be **GRANTED** as to Chaloult's claim for punitive damages and otherwise **DENIED**, and recommend that its motion for summary judgment be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 6th day of August, 2003.

_____
David M. Cohen
United States Magistrate Judge

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